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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ANGELITA GARCIA DEMONTOYA, Defendant and Appellant.	D073954 (Super. Ct. No. SCS282116)

APPEAL from an order of the Superior Court of San Diego County, Stephanie Sontag, Judge. Affirmed.

Crossroads Justice Center of San Diego and Lauren Cusitello for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and James M. Toohey, Deputy Attorneys General, for Plaintiff and Respondent.

Angelita Garcia DeMontoya (DeMontoya)[1] appeals after the court denied her motion to vacate her guilty plea based on her allegations pertaining to the immigration consequences of the plea. (Pen. Code, § 1473.7.)[2] We affirm.

OVERVIEW

In 2016, DeMontoya, a legal permanent resident, pled guilty to assault with a deadly weapon (§ 245(a)(1)), and admitted an enhancement alleging personal use of a deadly weapon (§ 1192.7(c)(23)). The court sentenced her to two years in state prison with credit for 349 days served. When she completed her sentence later that year, DeMontoya was transferred to immigration custody for deportation proceedings based on her section 245(a)(1) conviction with a two-year sentence.

In 2018, DeMontoya moved to withdraw her guilty plea under section 1473.7(a)(1), which permits withdrawal of a guilty plea when the defendant establishes "*prejudicial error* damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea . . . ." (Italics added.) After an evidentiary hearing, the court denied the motion based on its finding there was no prejudicial error.

DeMontoya contends the court erred in denying her motion because her counsel failed to request a plea bargain with no mandatory deportation consequences and/or

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1 DeMontoya's last name is spelled various ways in the record and the briefs. We use the spelling in the criminal complaint and Abstract of Judgment.

2 Undesignated statutory references are to the Penal Code. For readability, we omit the word "subdivision" in these statutory references.

advise DeMontoya of the availability of such a plea. We determine there was no error because even assuming there existed a more favorable immigration disposition, there was no evidence the prosecution would have agreed to this plea, and thus the record does not support that DeMontoya would have rejected the existing negotiated plea agreement. We also find unavailing DeMontoya's contention the court did not adequately specify its findings as required under former section 1473.7.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Summary

We base our factual summary on the probation report. DeMontoya rented a home from Landlord, who lived in in a residence behind the main house. On the day of the incident, Landlord came home from her job cleaning houses and DeMontoya told her to come into DeMontoya's residence. When Landlord walked into DeMontoya's bedroom, DeMontoya was with two other women whom the Landlord did not recognize. DeMontoya told Landlord to sign a check for $250,000 and the three women blocked Landlord from exiting the bedroom.

During an ensuing struggle, DeMontoya placed a machete against Landlord's neck and said "you better sign or else." DeMontoya was on top of Landlord, who was screaming while the women were attempting to tape Landlord's mouth shut. Landlord attempted to exit the bedroom through an open window, and DeMontoya's daughter and another witness observed DeMontoya holding onto her. One of DeMontoya's daughters called the police and helped Landlord exit through the window.

When police officers searched the bedroom, they found crumpled packaging tape. The officers later seized a machete DeMontoya's daughter found under the bed. Landlord had three marks on the right side of her neck, consistent with an object similar to a machete being pushed against her skin. She also had numerous bruises on her arms and a scratch on her forearm that was bleeding.

Charges and Guilty Plea

DeMontoya was charged in a complaint with three counts: (1) assault with a deadly weapon (§ 245(a)(1)); (2) attempted robbery (§§ 211, 664); and (3) false imprisonment by violence, menace, fraud, and deceit (§§ 236, 237(a)). The complaint alleged that in committing each count, DeMontoya personally used a dangerous and deadly weapon ("a machete/axe"). (§§ 1192.7, 12022(b)(1).)

In January 2016, DeMontoya agreed to plead guilty to the assault with deadly weapon count (§ 245 (a)(1)) and to admit the personal use enhancement, in exchange for the prosecutor's agreement to dismiss the two other counts and for the court to determine the sentence (with a maximum punishment of the four-year upper term on the assault offense).

Before the court accepted this plea, DeMontoya signed and initialed the guilty plea form. Part 7d. of the form states: "I understand that if I am not a U.S. citizen, this plea of Guilty/No Contest may result in my removal/deportation, exclusion from admission to the U.S. and denial of naturalization. Additionally, if this plea is to an 'Aggravated Felony' listed on the back of this form, then I **will** be deported, excluded from admission

to the U.S., and denied naturalization." (Boldface in original.) DeMontoya initialed the form next to these statements.

The back of the form states: "**ANY CONVCTION OF A NON-CITIZEN FOR AN 'AGGRAVATED FELONY' AS DEFINED UNDER 8 U.S.C 1101(a)(43), WILL RESULT IN REMOVAL/DEPORTATION, EXCLUSION, AND DENIAL OF NATURALIZATION**. [¶] '**AGGRAVATED FELONIES**' include, but are not limited to, the following crimes . . . ." The form then lists 20 separate crimes or categories of crimes, including: "**ANY CRIME OF VIOLENCE*** [¶] (Includes any offense that has as an element the use, attempted use, or threatened use of physical force against the person . . . of another, or any felony offense that, by its nature, involves a substantial risk that physical force against the person or property of another may be used . . . ." The bottom of the page contains the notation regarding the asterisk (*), stating: "**Where the term imposed is at least one year, whether or not any or all of that term is stayed or suspended at the time of sentencing.**"

DeMontoya's attorney (Albert Arena) signed the guilty plea form, stating he explained the entire form to DeMontoya and discussed the charges, possible defenses, and plea consequences, "including any immigration consequences."

At the change of plea hearing, the court (Judge Gary Haehnle) questioned DeMontoya and confirmed her understanding of the contents of the form, including that the form had been translated into Spanish. Of relevance here, the court stated to DeMontoya: "Also understand that if you are not a U.S. citizen, this plea of guilty *would*

result in you being deported, excluded from admission to the U.S., and denied naturalization?" (Italics added.) DeMontoya responded, "Yes."

At the conclusion of the hearing, Judge Haehnle accepted the change of plea, finding DeMontoya voluntarily and intelligently waived her constitutional rights; her plea was freely and voluntarily made; she understood "the nature of her charges, the consequences of her plea and admission"; and there was "a factual basis for the plea."

In preparation for sentencing, a probation officer interviewed DeMontoya, who expressed remorse. DeMontoya said she became upset after Landlord sprayed bleach on her face during an argument (a bottle of bleach was found in the bedroom). She said she placed the machete on Landlord's neck to scare her, but she had no intention of hurting her. The probation report reflects that DeMontoya has no criminal history, does not have alcohol problems, and has never used controlled substances. The probation officer concluded the offense "was probably an isolated incident," but that DeMontoya was "clearly out of control" and "needs to participate in anger management in order to prevent further violent outbursts."

The probation officer found DeMontoya was presumptively ineligible for probation (§ 1203(e)(2)) based on her guilty plea to assault with a deadly weapon, but recommended probation under the rule that probation may be granted in "unusual cases where the interests of justice would best be served" (§ 1203(e); see Cal. Rules of Court, rule 4.413). The officer recommended three years of formal probation.

Sentencing Hearing

At the sentencing hearing, defense counsel urged the court to grant DeMontoya probation based on DeMontoya's family and community support and lack of criminal record, and the fact the probation officer found the crime to be an "isolated incident."

Landlord then spoke at length about her terror during the incident and its long-term emotional and psychological impact on her life. She strongly urged the court to impose a lengthy sentence, stating that she has "no peace of mind . . . neither day or night."

The prosecutor asked the court to impose the three-year middle term, emphasizing the seriousness of the offense and the strong evidence supporting the crime (including the "crumpled up tape," the machete, and the witness statements). The prosecutor said: "[B]ased on the circumstances, the machete to the neck, holding the lady basically hostage in that room, trying to bind her up and causing the kind of emotional impact that is obvious in this case, . . . the appropriate sentence is the middle term."

In response, DeMontoya's counsel noted that the guilty plea "will have a dramatic impact on her immigration status," stating: "So if the victim is looking for punishment, it's a good strong likelihood that Ms. DeMontoya will not be able to enjoy all the United States has to offer. She is mostly likely going to be deported to Mexico. Perhaps the Court could stay a prison term and allow Ms. DeMontoya to prove to this Court that indeed this is a one time isolated incident."

After considering the arguments, Judge Haehnle imposed the two-year lower term on the section 245(a)(1) count. The court first directed its comments to Landlord,

explaining that its discretion was limited because of the need to consider various mitigating factors, such as DeMontoya's age and lack of criminal record, but the court also made clear it understood the dangerousness of DeMontoya's conduct. The court stated:

> "Wow, this is a very serious matter. . . . [I]t really hit me today how serious this was once I read [Landlord's] letter. And I remember when we discussed this case I thought it was serious, I thought there were some things that sounded very out of control on Ms. DeMontoya's behalf.
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> "But then when I [sat] down and read all this and put it all together, this is a case that based on what I read I don't agree with probation. I don't think probation is appropriate in this case . . . .
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> "For a one time out of character response, this was . . . pretty extreme. It involved the use of a weapon. It involved the use of tape. It involved [Landlord] having to dive out a window to save her life from these people. It involved robbery, basically, I mean, there was extortion, give us money. I mean, this has [it] all. This has violence and all kinds of things added into it.
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> "And I think . . . Ms. DeMontoya . . . represents a danger to the community, and I don't think probation is appropriate in this case. [¶] . . . [¶]
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> "[Additionally], she is presumptively ineligible for probation. [¶] And I have to find a circumstance in the interest of justice to find that she is eligible for probation, and I have not been able to find that. [¶] . . . So probation will be denied.
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> "Now when I look at the term in prison that I have to give her in this case, I do consider the fact that she is 46. She has no prior record. *She will suffer a dire consequence of being deported from the country back to Mexico*. And I don't know how long it has been since she's been there and if she has any means back there of support. Her family is here, which is going to put a burden on them since she won't be there.

> "So I weigh that fact against the serious nature of this, and . . . I believe that the low term is appropriate in this case of two years." (Italics added.)

DeMontoya completed her sentence in September 2016, and then was immediately transferred to immigration custody at Otay Mesa Detention Center.

DeMontoya's Section 1473.7 Motion

In March 2018, DeMontoya moved to vacate her conviction and withdraw her guilty plea under section 1473.7(a)(1). At the time, she remained in immigration custody. She asserted three grounds for the motion: (1) her defense counsel did not explain that by pleading guilty to section 245(a)(1) without any limitations on her sentence, "she was signing up for the possibility of certain deportation"; (2) the prosecutor failed to " 'consider the avoidance of adverse immigration consequences [of DeMontoya's] plea [when trying to] reach a just resolution' " (see § 1016.3); and (3) DeMontoya's attorney provided constitutionally ineffective assistance by failing to propose a sentencing cap of 364 days on the section 245(a)(1) count, which would not have triggered mandatory deportation.

On the third ground, her counsel argued that DeMontoya "could have pled guilty to both counts 1 [assault with a deadly weapon] and 3 [false imprisonment], with an agreement that her sentence would not exceed 364 days on count 1. Such a resolution would have included a felony conviction on count 3, and could even have resulted in a prison sentence on that count, but would have avoided the potential immigration consequences of a prison sentence on count 1." She argued the errors were prejudicial

because they affected her ability to "meaningfully" understand the immigration consequences of her plea and conviction.

DeMontoya submitted her supporting declaration stating she is currently in immigration removal proceedings and the immigration court appointed an attorney to represent her "due to [her] severe mental disability." She said she has been diagnosed with depression, posttraumatic stress disorder, and anxiety. She said she has lived in the United States since 1984 when she was about 13 years old, and became a legal permanent resident in 2007. Both her daughters were born in California and she has a grandson.

With respect to her assertion that she did not understand the immigration consequences of her plea, DeMontoya said her plea counsel (Arena) was aware she was a legal permanent resident, and he told her the case "would be bad for immigration, but he did not tell [her] exactly what the consequences would be." She also said:

> "I did not know that a person who is a permanent resident can also be deported. . . . [¶] . . . Mr. Arena told me that if I did not accept the plea offer, I could get life in prison. He told me that if I accepted the plea offer, it was likely that I would receive a time-served sentence. Mr. Arena did not tell me until after I was sentenced that I was going to be deported and that I would need an immigration attorney. Mr. Arena also did not tell me that I would have to be detained without bail during my immigration case because of the conviction.
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> ". . . If I had known that my conviction would almost certainly lead to my deportation, I would not have pled guilty. If I had to, I would have agreed to spend more time in jail to avoid being deported. I have been in immigration detention since September 2016, which is longer than I spent in jail for the criminal case."

She also submitted the declaration of her appointed immigration attorney, who detailed DeMontoya's severe mental health problems, including a recent suicide attempt.

DeMontoya's immigration attorney also explained the mandatory deportation consequence of her guilty plea and the fact that deportation would not have been mandatory if she had pled to less than 365 days on the section 245(a)(1) charge:

> "[DeMontoya's] two-year prison sentence for violating section 245(a)(1) . . . makes that conviction a categorical aggravated felony. This means that [DeMontoya] is definitely removable based on this conviction, and there [is] no viable argument against removability. . . . Because the Immigration and Nationality Act requires a sentence of more than one year for a crime of violence to qualify as an aggravated felony, [DeMontoya] would not be removable if she had received a sentence of less than one year for this offense. She also would not be removable if she had received a total sentence of two years, but no more than 364 days on any one count.
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> ". . . Although [DeMontoya] has been a permanent resident for nearly 11 years, she is not eligible for any relief from removal because this conviction is an aggravated felony. . . . If [DeMontoya] had been convicted of an offense that was not an aggravated felony, she would be eligible for a form of relief known as cancellation of removal, which would allow [DeMontoya] to maintain her status as a permanent resident. . . .
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> ". . . [DeMontoya] is also ineligible for asylum and for withholding of removal, although there is a high probability that she will be confined to an inhumane psychiatric hospital if she is deported to Mexico. . . ."

Evidentiary Hearing

At the hearing on DeMontoya's section 1473.7 motion, DeMontoya's former defense counsel (Arena) was the only witness. Arena testified he has been practicing criminal law for 34 years and met with DeMontoya at least three times with a certified Spanish interpreter during the representation. He felt the prosecution had a "very strong" case on the charges of assault with a deadly weapon and false imprisonment. He noted

that DeMontoya's daughter, who had worked for the San Diego County Sheriff's Department, called 911 during the incident to report that her mother "was attempting to kill somebody."

Arena said he tried to convince the prosecutor to allow DeMontoya to plead guilty only to the false imprisonment charge, but the prosecutor was unwilling to agree. Arena said during these negotiations, the prosecutor handed him an amended complaint, "indicating he was going to file" the complaint and add a charge of kidnapping for extortion or pecuniary gain (§ 209), which carried a potential life term. Arena said this proposed amended complaint "was a game-changer for us in how we approached this case," because he was certain the prosecutor was serious about adding the kidnapping charge. He said that although the prosecutor ultimately did not file the amended complaint, the possibility caused him substantial concern because his research disclosed the facts could potentially support this charge.

Arena testified that when he was trying to settle the case, he was "very, very much aware" of DeMontoya's permanent resident immigration status and that avoiding deportation was very important to DeMontoya. He said "we were talking about immigration consequences throughout the entire case, and "one of [his] goals" was to resolve the case in a way that would avoid deportation. Arena said he discussed with the prosecutor that DeMontoya would have immigration consequences from any plea. Arena also said he told DeMontoya and her daughter that they should speak to an immigration attorney.

Consistent with his usual practice "to err on the side of caution" and to inform a defendant of the most severe possible consequences, Arena told DeMontoya she *would* be deported if she pled guilty to the section 245(a)(1) charge because it was a crime of violence, and DeMontoya understood "deportation was going to happen." Arena said: "When we finally settled [on the guilty plea to] the [section] 245 [count], I said 'Look. You can't risk the life term. You can't roll the dice out. We will have to settle for the 245.' " Arena also told DeMontoya that the court could select the probation option, and if the court selected this option, "it would be extremely helpful" to later immigration issues. He told her she had a " 'good shot at probation,' " but that " 'you will be deported.' " Arena said: "Because of facing the possibility of a life term on the [kidnaping charge,] I told her it was better to be free in Mexico than doing at least seven years in state prison."

When asked whether he was aware of any different immigration consequence if she received a sentence of 364 days on the assault charge, Arena said "there is no guarantee" that a defendant can avoid deportation with any plea deal and that "my position [was] and remains today is that any chance you may have, you have a best chance with probation and not state prison . . . ."

On cross-examination, Arena testified he was aware that a "nonserious and nonviolent [crime] has significant benefits to the immigration process and may prevent someone from being deported." He was not sure whether the same was true for aggravated felonies with probation.

At the conclusion of Arena's testimony, DeMontoya's current counsel argued that Arena provided constitutionally ineffective assistance because he was unaware that a

less-than-one-year sentence on the section 245(a)(1) count would not result in mandatory deportation. DeMontoya's counsel asserted: "telling someone that there is no way to avoid deportation, where there is a way to avoid deportation, is giving that person an inaccurate picture of their options." DeMontoya's counsel argued that one potential unexplored proposal was for DeMontoya to plead to "both Count 1 and Count 3, but with a cap of 364 days on Count 1," noting this plea would have avoided the mandatory deportation consequence.

In response to the court's question about whether there was any evidence the People would have accepted this proposal, defense counsel acknowledged she had not subpoenaed the prosecutor who negotiated the plea agreement. But counsel argued the court could infer the prosecutor would have been willing to accept a plea agreement with a 364-day sentencing cap on the section 245(a)(1) count because he had agreed to allow the court to determine sentencing, including the possibility of probation.

The prosecutor at the section 1473.7 hearing did not challenge DeMontoya's interpretation of immigration laws with respect to the effect of a greater-than-one-year sentence on the section 245(a)(1) conviction, but argued there was no basis for relief because there was no evidence the prosecutor in DeMontoya's criminal case would have accepted a plea with a stipulated 364-day (or less) sentence.

Court's Ruling

After considering the evidence and arguments, the court (Judge Stephanie Sontag) denied the motion. The court first rejected DeMontoya's assertion she was unaware of the mandatory deportation consequence of her plea. The court said: "She was told she

was going to be deported. Whether she assimilated that fact or not, she was told she was going to be deported several times. So . . . you can't use that argument."

But the court found the evidence supported DeMontoya's claim that Arena did not consider the impact of the section 245(a)(1) sentence length on DeMontoya's deportation exposure. The court said Arena was "[c]learly . . . unaware that a sentence of 364 or less would avoid deportation," and instead followed his "custom and practice" to warn about the "worst possible consequences." The court said it was "a little haunted" by Arena's failure to consider the one-year rule because it precluded him from "present[ing] alternatives to the district attorney's office . . . that . . . could result in a different outcome." But the court ultimately concluded the failure to present the alternative was not prejudicial within the meaning of section 1473.7. The court stated in part:

> "I'm going to deny your motion finding that you haven't presented proof that there is prejudicial error damaging the moving party's ability to understand and defend against or knowingly accept the actual or potential adverse immigration consequences.
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> "[I]n the totality of the circumstances, I don't think there has been evidence presented that there would be a difference in outcome that—although I think you have presented evidence that it's pretty disturbing that the alternatives weren't considered, and they should have been. That evidence is here. I just don't have any evidence . . . that it would have made a difference in this case, and I think there needed to be evidence of that, at last some—beyond a possibility. . . .
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> "So it's a close call, but you have the burden so it's one of those calls. That's what I'm deciding. [¶] . . . [¶]
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> ". . . I needed some evidence . . . that those different pleas would [have been] entertained or considered, and I don't have that. [¶] . . . I have the [kidnapping charge] being possibly filed with a life top. I have the [prosecutor saying] I'll [accept] a plea to the most serious

> offense that is currently charged . . . . I will not agree to a probationary sentence, but I won't preclude the judge from doing that. [¶] So you do have that evidence that the district attorney was not insisting on a stipulated prison sentence, but on the other hand did not stipulate to probation either . . . ."

DISCUSSION

A. *Legal Principles*

Section 1473.7(a)(1) provides: "A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence [if] [¶] . . . [t]he conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere. A finding of legal invalidity may, but need not, including a finding of ineffective assistance of counsel."[3]

If the moving party establishes, by a preponderance of the evidence, prejudicial error under this provision, the court "shall" grant the motion to vacate the conviction or sentence. (§ 1473.7(e)(1).) To establish prejudice, a defendant must prove by a preponderance of the evidence that, if properly advised, he or she would not have agreed

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3 The last sentence was added by 2018 legislation, effective January 1, 2019, during the pendency of this appeal. (Stats. 2018, ch. 825, § 2.) Viewing the legislative history, a Court of Appeal recently found this amendment to be a clarification and thus that it applies retroactively. (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1006-1009 (*Camacho*).) We have thus assumed its applicability, but find it does not change the result in this case.

to the negotiated disposition. (*People v. Martinez* (2013) 57 Cal.4th 555, 559, 565, 566-567 (*Martinez*).)[4]

DeMontoya contends a de novo review is the appropriate standard to evaluate the court's rulings on her ineffective assistance of counsel claim. The Attorney General counters that we should apply an abuse of discretion standard. The issue is not fully settled, but most courts have applied a mixed review standard to evaluate rulings on ineffective assistance challenges under section 1473.7. (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76 (*Ogunmowo*); *People v. Tapia* (2018) 26 Cal.App.5th 942, 950 (*Tapia*); *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116 (*Olvera*).) Under this mixed-review standard, courts "accord deference to the trial court's factual determinations if supported by substantial evidence in the record, but exercise [their] independent judgment in deciding whether the facts demonstrate trial counsel's deficient performance and resulting prejudice to the defendant." (*Ogunmowo,* at p. 76; accord, *Tapia,* at p. 950.) We need not resolve this dispute in this case because we would reach the same conclusion under either the abuse of discretion or mixed substantial evidence/de novo standard.

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4 *Martinez* interpreted an analogous statute requiring advisements about immigration consequences (§ 1016.5), and the courts have held *Martinez*'s prejudice analysis "appl[ies] equally to [motions brought] under section 1473.7." (*Camacho, supra,* 32 Cal.App.5th at p. 1010.)

B. *Analysis*

In the court below, DeMontoya asserted several theories supporting her section 1473.7 motion, including that her counsel did not inform her that her plea would result in deportation, and her counsel provided ineffective representation by failing to inform her of the possibility of an immigration-neutral plea and to seek to obtain the prosecutor's agreement to that plea.

The trial court found the first ground was unsupported by the evidence. The record supports this conclusion. DeMontoya was told numerous times that her guilty plea on the section 245(a)(1) count would result in deportation, and she expressed understanding of this consequence. The court found this evidence credible. We do not reweigh the evidence when evaluating the court's factual findings. (See *Tapia, supra,* 26 Cal.App.5th at pp. 951-953.) On appeal, DeMontoya does not reassert this ground as a basis for error.

DeMontoya's main appellate contention instead is that the court erred in denying her motion to withdraw her plea because the undisputed evidence establishes her counsel failed to inform her of the possibility of a plea without mandatory deportation consequences and to seek to obtain the prosecutor's agreement to that plea. Specifically, she argues that a conviction for violating section 245(a)(1) is an "aggravated felony" requiring mandatory deportation when, and only when, a defendant receives a sentence of one year or more. She contends she was unaware of this rule before she agreed to plead guilty to section 245(a)(1) with an agreement that the court would determine the sentence.

In the section 1473.7 motion proceedings below, the People did not challenge that only a one-year (or more) sentence on the section 245(a)(1) charge would trigger mandatory deportation. The Attorney General likewise does not dispute this rule. We concur. Under federal immigration law, a person with lawful permanent resident status who commits an "aggravated felony" (such as an assault with a deadly weapon) is subject to mandatory deportation only if the sentence is " 'at least one year.' " (*Mairena v. Barr* (9th Cir. 2019) 917 F.3d 1119, 1124, fn. 5; see 8 U.S.C. §§ 1101(a)(43)(J), 1227(a)(2)(A)(iii); *Delgado v. Holder* (9th Cir. 2011) 648 F.3d 1095, 1101; see also *People v. Segura* (2008) 44 Cal.4th 921, 927.) This "aggravated felony" definition was reflected on the back of the change-of-plea form signed by DeMontoya and her counsel.

The trial court found that DeMontoya's plea counsel (Arena) did not inform her of the distinction between a one-year- and a less-than-one-year sentence for purposes of mandatory deportation; he did not consider this legal principle when advising DeMontoya and negotiating the plea; and DeMontoya was not otherwise aware of the relevance of the one-year sentence length on the immigration consequences of her plea. But the court found that even if these facts showed her counsel acted below the standard of care and/or DeMontoya did not meaningfully understand the full range of possible immigration outcomes in the case, these facts do not support relief under section 1473.7 because DeMontoya did not meet her burden to show *prejudice.* (§ 1473.7.)

On our independent review of the record, we reach the same conclusion.

A failure to investigate an immigration-neutral alternative disposition in plea bargaining can constitute a ground for deficient performance to support relief under

section 1437.7. (See *People v. Bautista* (2004) 115 Cal.App.4th 229, 238 (*Bautista*) [challenge brought on a habeas petition].) However, prejudice must also be shown. (§ 1473.7; *Ogunmowo, supra*, 23 Cal.App.5th at p. 78.)

To establish prejudice based on a claim of deficient representation by failing to advise about or negotiate an "immigration safe" (or "immigration-safer") plea bargain, a party must present evidence that he or she would not have agreed to the guilty plea had he or she known of the possibility of another option. (See *Martinez, supra,* 57 Cal.4th at p. 567; *Ogunmowo, supra,* 23 Cal.App.5th at pp. 78-81.) In evaluating this claim, the court must consider the totality of the circumstances, including: "the presence or absence of other plea offers, the seriousness of the charges in relation to the plea bargain, the defendant's criminal record, the defendant's priorities in plea bargaining, the defendant's aversion to immigration consequences, and whether the defendant had reason to believe that the charges would allow an immigration-neutral bargain that a court would accept." (*Martinez, supra,* 57 Cal.4th at p. 568.)

In applying this analysis, " '[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies.' " (*Ogunmowo, supra,* 23 Cal.App.5th at p. 78, quoting *Lee v. United States* (2017) __ U.S. __, 137 S.Ct. 1958, 1967.) Instead, the defendant must present " 'contemporaneous evidence' " supporting that she would have rejected the plea agreement under all the circumstances. (*Ibid.*; see *People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 223-224.) Although the defendant need not establish that the prosecutor would have offered or accepted a different disposition and/or that the

defendant would have obtained a better outcome at trial (*Martinez, supra,* 57 Cal.4th at pp. 566-567; *Ogunmowo, supra,* 23 Cal.App.5th at p. 78), these factors are relevant to the analysis whether the defendant met her burden to show she would not have entered into the guilty plea had she been properly advised (see *Tapia, supra,* 26 Cal.App.5th at pp. 953-954; *Olvera, supra,* 24 Cal.App.5th at p. 1118 [denying § 1473.7 motion where defendant failed to "identify any immigration-neutral disposition to which the prosecutor was reasonably likely to agree"]).

In this case, there are no *facts* in the record showing that DeMontoya's attorney could have successfully brokered a more favorable immigration disposition. The sole contemporaneous evidence on this subject—Arena's testimony—supports a contrary conclusion: that he attempted to convince the prosecution to accept DeMontoya's plea to the false imprisonment charge, but the prosecutor would not agree to this, and instead made clear his intention to file an amended pleading that would add the much more serious crime of kidnapping that had a potential life term. Likewise, Arena's testimony reflects that DeMontoya was not willing to risk going to trial because there was no reasonable basis to support that she would have obtained a more favorable immigration outcome at trial and/or that she was willing to be exposed to the kidnapping charge.

Further, DeMontoya did not call the prosecutor, who could have provided relevant information regarding his willingness to consider a 364-day stipulated sentence on the section 245(a)(1) charge. At the section 1473.7 hearing, DeMontoya's counsel conceded she could have subpoenaed the prosecutor to testify, but admitted she did not do so. As she did in the proceedings below, DeMontoya argues that testimony from the prosecutor

was unnecessary because the plea deal to which the prosecutor ultimately agreed did not contain a fixed sentence and allowed plea counsel to argue for probation. She maintains we can reasonably infer from this plea agreement that the prosecutor would have agreed to accept guilty pleas to the section 245(a)(1) and the false imprisonment charges, with an agreement that the sentence *on the assault count* would not exceed 364 days (with the possibility of a total longer sentence).

This inference is speculative. In accepting the guilty plea with the court to determine the sentence, the prosecutor was aware DeMontoya was presumptively ineligible for probation and that it was unlikely a court would find DeMontoya had met her burden to rebut that presumption, given the seriousness of the offense and the severe emotional trauma suffered by the victim. The prosecutor knew that the victim—who had continuing serious mental and emotional injuries from the assault—had strong feelings about the crime and the appropriate punishment, and intended to speak at the sentencing hearing. The court and the prosecutor were also aware of the deportation consequences of the plea, and could take these into account in deciding the appropriate sentence.

During the negotiations, the prosecutor was prepared to file an amended complaint charging an offense punishable by a life term. Although the plea deal to which the prosecutor agreed did not constrain counsel's ability to argue for probation, it also did not limit the prosecutors' ability to argue for a three- or four-year prison term at the sentencing hearing. A prosecutor has the obligation to *consider* whether immigration consequences should be avoided, but this obligation does not require the prosecutor to structure a plea to avoid the consequences if the prosecutor finds these consequences to

be a fair outcome. (§ 1016.3(b).) It is undisputed the prosecutor and defense counsel discussed the immigration consequences of the plea deal, and the prosecutor was unwilling to accept a plea to false imprisonment that would have been more immigration-favorable.

Bautista, *supra*, 115 Cal.App.4th 229 is distinguishable. There, the defendant claimed his plea counsel was ineffective for failing to attempt to negotiate a plea bargain to a nonaggravated felony, even if the plea would have required him to " 'plead upward' " and spend more time in prison. (*Id.* at p. 238.) The defendant offered an expert witness declaration from an immigration attorney detailing various methods the defendant's plea counsel could have employed to defend against adverse immigration consequences. (*Id.* at pp. 238-240.) The expert *additionally* opined the prosecutor would have likely accepted an offer to plead to a more serious offense with a higher penalty because the expert had either personally handled or consulted on five cases in which a similar outcome had been achieved. (*Id.* at p. 240.) The defendant declared that he would have asked his attorney to defend the case to avoid or minimize deportation consequences and would have offered to serve in custody to prevent against deportation, if he had known of the nondeportable alternatives to his plea. Under these circumstances, the Court of Appeal found sufficient evidence to issue an order to show cause for the trial court to consider defendant's ineffective assistance claim. (*Id.* at pp. 237-242.)

Unlike *Bautista*, DeMontoya did not present any *evidence* showing that her *current* proposed plea (a stipulated 364-day sentence on the § 245(a)(1) count with the possibility of additional time on the false imprisonment count) was likely to have been

accepted by the prosecutor and thus that she would have declined to accept the existing plea agreement.

In sum, DeMontoya was repeatedly informed that she would be deported as a result of her plea and she pled guilty with full knowledge of the adverse immigration consequences. She was also aware that the prosecutor was ready to file an amended complaint with a much more serious charge—kidnapping—that had a possibility of a life term, and that her attorney's research showed some factual support for the charge based on the facts of the case. She was offered a favorable plea agreement that left open the possibility of probation, a disposition that would not carry a mandatory deportation consequence. There was no evidence that the prosecution would agree to a different plea deal, even if the deal would include a 364-day stipulated sentence on the assault charge. On this record, DeMontoya did not meet her burden to show prejudicial error, i.e., that she would not have accepted the plea agreement had she been aware of the immigration-law distinction between a one-year and a less-than-one-year sentence on the assault count.

DeMontoya alternatively contends the court erred in failing to "specify the basis for its conclusion" in denying the motion, as required by former section 1473.7.[5] We reject this contention. The court made clear its findings that it was denying the motion because it found DeMontoya did not meet her burden to establish that the prosecutor

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5 The 2019 amended version of the statute no longer requires the court to "specify the basis for its conclusion" when ruling on a motion under section 1473.7(a)(1).

would have accepted the immigration-safe plea bargain proposed as a basis for her motion. This finding was sufficient to "specify the basis" for the court's conclusion that the conviction was not legally invalid because of prejudicial error.

DISPOSITION

Order affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.